

Benefit-Cost Analysis in the United States and Europe

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Does Europe prefer “Precaution” to BCA (more than the US does) ?

“More and More, Europeans Find Fault with US: Wide Range of Events Viewed as Menacing” -- NY Times, 9 April 2000, p.A1

“Precaution is for Europeans” – NY Times, April 2003

“Europe is considered fairly risk-averse ... America, on the other hand, is often seen as having a strong risk-taking culture” – The Economist, 24 January 2004

View espoused by:

- EU officials
- NGOs
- News media
- Scholars

“In the US they believe that if no risks have been proven about a product, it should be allowed. In the EU we believe something should not be authorized if there is a chance of risk.”

-- Pascal Lamy, EU Trade Commissioner, 1999

E.g. David Vogel et al. (2000, 2001): Reversal (“flip-flop”) in relative US/EU precaution over 1970-2000

Stereotypes vs. social science

- **An old story: “The Canterville Ghost,” by Oscar Wilde (1887)**
- **Heuristic exaggeration of contrasts between similar groups**
 - Henri Tajfel, social psychology
- **Sampling bias: “availability” heuristic**
 - Broad claims drawn from a few recent visible cases (e.g.: GM foods).
 - Sampling by convenience – cases under the streetlamp – cherry-picking.
- **Fixed cultural stereotypes vs. hypotheses of changing positions**
 - E.g., “Europeans are more risk-averse” conflicts with “Flip-flop”
- **Variation by component**
 - risk assessment, risk management, oversight, enforcement
- ***The Reality of Precaution* project – better ways to compare:**
 - Case Studies – a wider array – deeper, but selective
 - Aggregate Data – broadly representative, but shallow

Expanded case studies: Precaution on both sides

EU



1970s – 80s:

- **Marine environment**
- **Guns**

1990s - present:

- **Hormones in Beef, rBST**
- **GM foods / crops**
- **Climate**
- **Toxic Chemicals**
- **Diesel - more (CO2)**

US



1970s – 80s:

- **New drug approval**
- **CFCs**
- **Nuclear power**
- **Endangered species**
- **Lead (Pb) in gas/petrol**

1990s - present:

- **BSE in Beef (?), Blood**
- **Smoking**
- **Diesel - less (PM)**
- **Youth violence**
- **Terrorism & WMD**

(See Wiener, “Whose Precaution After All?” 13 Duke J. Compar. & Intl. L. 207 (2003).)

Testing a Larger Sample

Universe
of all
risks

11,086
“verbatim”
risks from
254 sources
in literature
on risk
perceptions,
ranking, and
classification,
1960-2003,
in US and
Europe

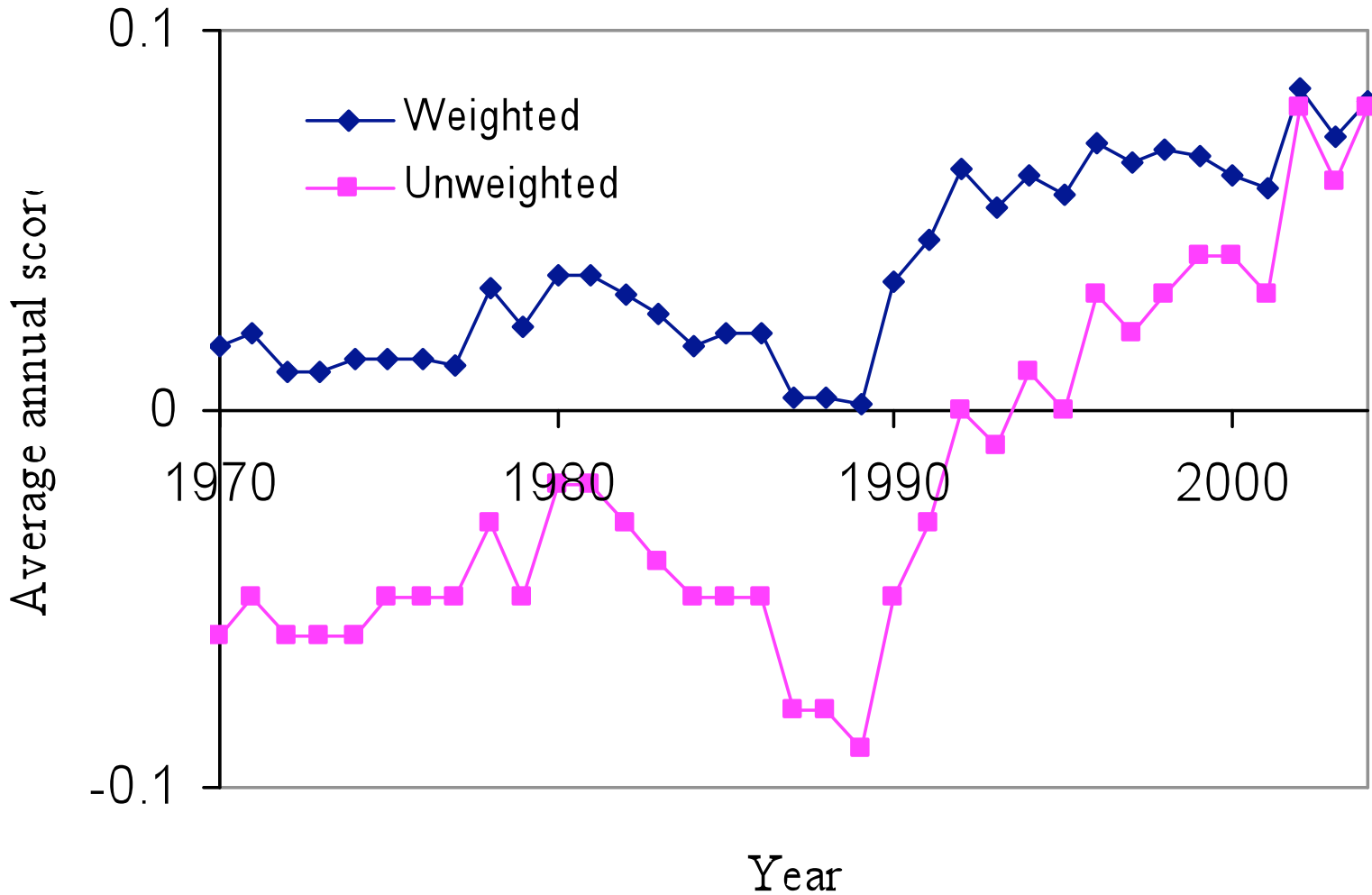
2,878
“unique”
risks
(recom-
bining
essentially
identical
“verbatim”
risks)

In 18
categories
and 92
sub-
categories

**100 in random
sample;
92 in stratified
random sample**

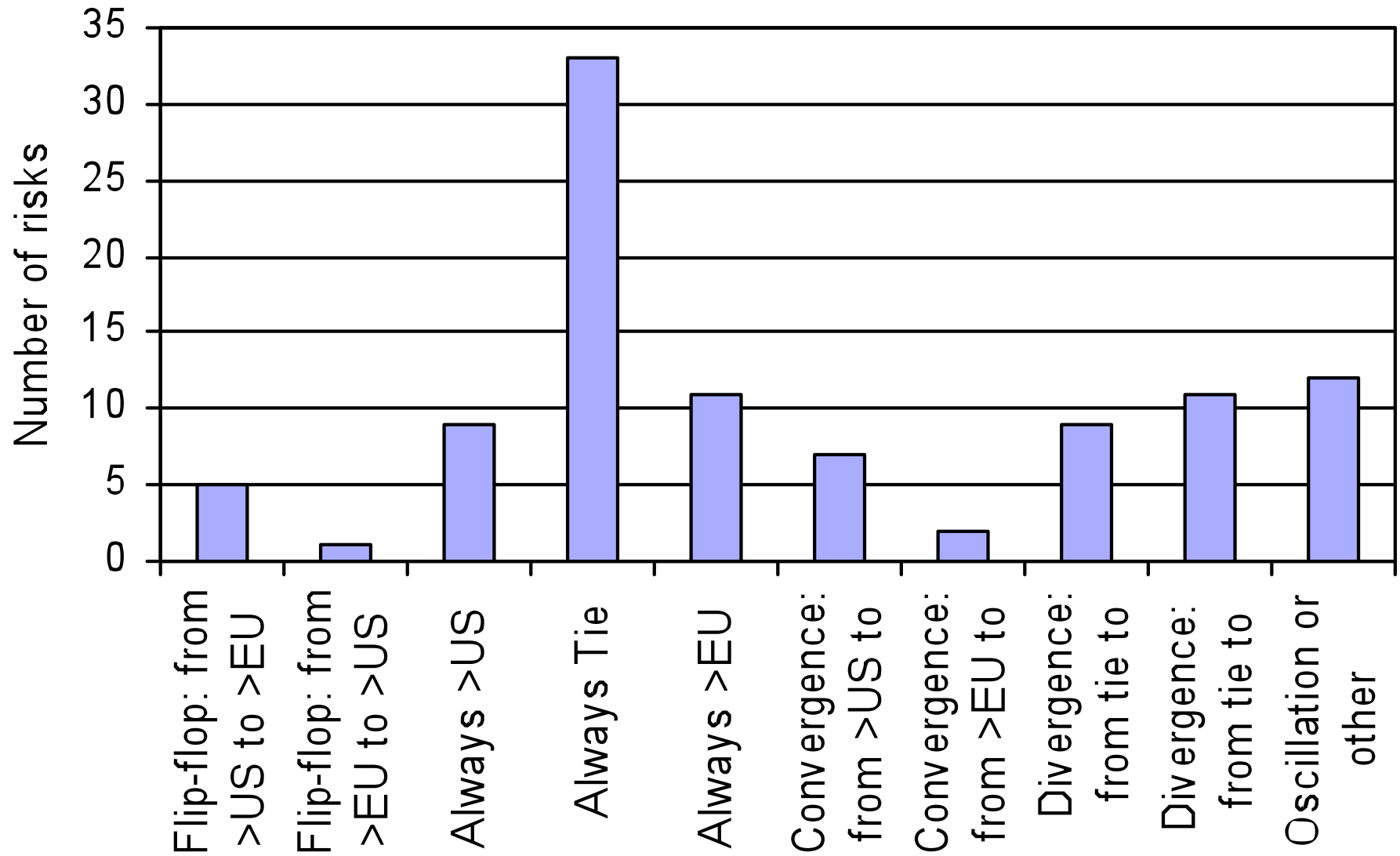
**Scored each risk in
each year, 1970-2004:
+1 if greater EU
stringency
0 if tie
-1 if greater US
stringency**

Figure 1. Trends in relative precaution
(all risks)



Source: Hammitt, Wiener, et al., 25 Risk Analysis 1215 (October 2005).

Figure 4. Patterns of Relative Precaution



The Reality of Precaution: key findings

- Numerous cases in each direction
- No general trend in US-EU degree of precaution, 1970-2004
 - Only slight shift toward relatively greater EU precaution since 1990. Very slight: only 3-6% of sample.
- Diversity across risks
 - Shift toward greater EU precaution: 21 risks
 - Shift toward greater US precaution: 14 risks
 - Always equal: 33 risks
 - EU always more precautionary: 11 risks
 - US always more precautionary: 9 risks
- Diversity within US, EU
- *Why do different societies worry more about different risks?*
- *How are the USA and the EU borrowing and learning from each other?*

Europe Borrowing BCA from USA: “Better Regulation”

- Tony Blair, UK, “Risk and the State,” 26 May 2005:
 - “Better Regulation” will introduce a “rigorous risk-based approach” that will employ impact assessments and “regulate only after reflection,” avoiding regulations that “do more damage than was done by the problem itself.”
- Bertie Ahern, Ireland, 2004:
 - “Better Regulation is a core theme of our EU Presidency ... Many of the policies, institutions and tools that support Better Regulation have their origins in the USA. ... There is much that we have learned from the United States in relation to regulatory management and, through occasions like this, much that we can continue to learn. ... We hope too that there will be shared learning. While we in the European Union are newer to the game, I hope that we have moved beyond our rookie season! The Union is making up ground quickly in respect of Better Regulation.”

BCA: an old American idea (& advice to Europe)

Benjamin Franklin, letter to Joseph Priestley, Sept. 19, 1772:

“In the Affair of so much Importance to you, wherein you ask my Advice, I cannot for want of sufficient Premises, advise you *what* to determine, but if you please I will tell you *how*. When those difficult Cases occur, they are difficult, chiefly because while we have them under Consideration, **all the Reasons *pro* and *con* are not present to the Mind at the same time**; but sometimes one Set present themselves, and at other times another, the first being out of Sight. . . .

“To get over this, my Way is, to divide half a Sheet of Paper by a Line into **two Columns**; writing over the one **Pro**, and over the other **Con**. Then during three or four Days Consideration, I put down under the different heads short Hints of the different Motives, that at different Times occur to me, *for* or *against* the Measure. When I have thus **got them all together in one View**, I endeavour to **estimate their respective Weights** . . . and thus proceeding I find at length **where the Ballance lies** . . .

“And, tho’ **the Weight of Reasons cannot be taken with the Precision of Algebraic Quantities**, yet, when each is thus considered, separately and comparatively, and **the whole lies before me, I think I can judge better, and am less liable to make a rash Step**; and in fact I have found great Advantage from this kind of Equation, in what may be called ***Moral or Prudential Algebra.***”

Stimuli for borrowing ideas on Better Regulation

- Response to growth & cost of regulatory state
 - USA: Administrative Procedure Act (APA) (1946) after ‘New Deal’; Presidential Executive Orders (EOs) (1970s-90s) after ‘Great Society’
 - EU: “Better Regulation” (2001-06) after growth of EU institutions & series of Precautionary policies
- Response to crisis in credibility of governance
 - US 1970s: Watergate Scandal, Nixon resignation, energy crisis
 - EU 1999: resignation of Santer Commission
- Globalization of world economy
 - Competitiveness pressure to harmonize standards and reduce costs
 - Key objective of EU in the Lisbon Agenda (2000)
- Transnational networks help spread legal/policy ideas
 - Experts: policymakers, lawyers, judges, scholars, students, think tanks
 - environmental NGOs
 - multinational corporations
 - Fora such as EU and OECD

Toward Better Regulation by borrowing across countries

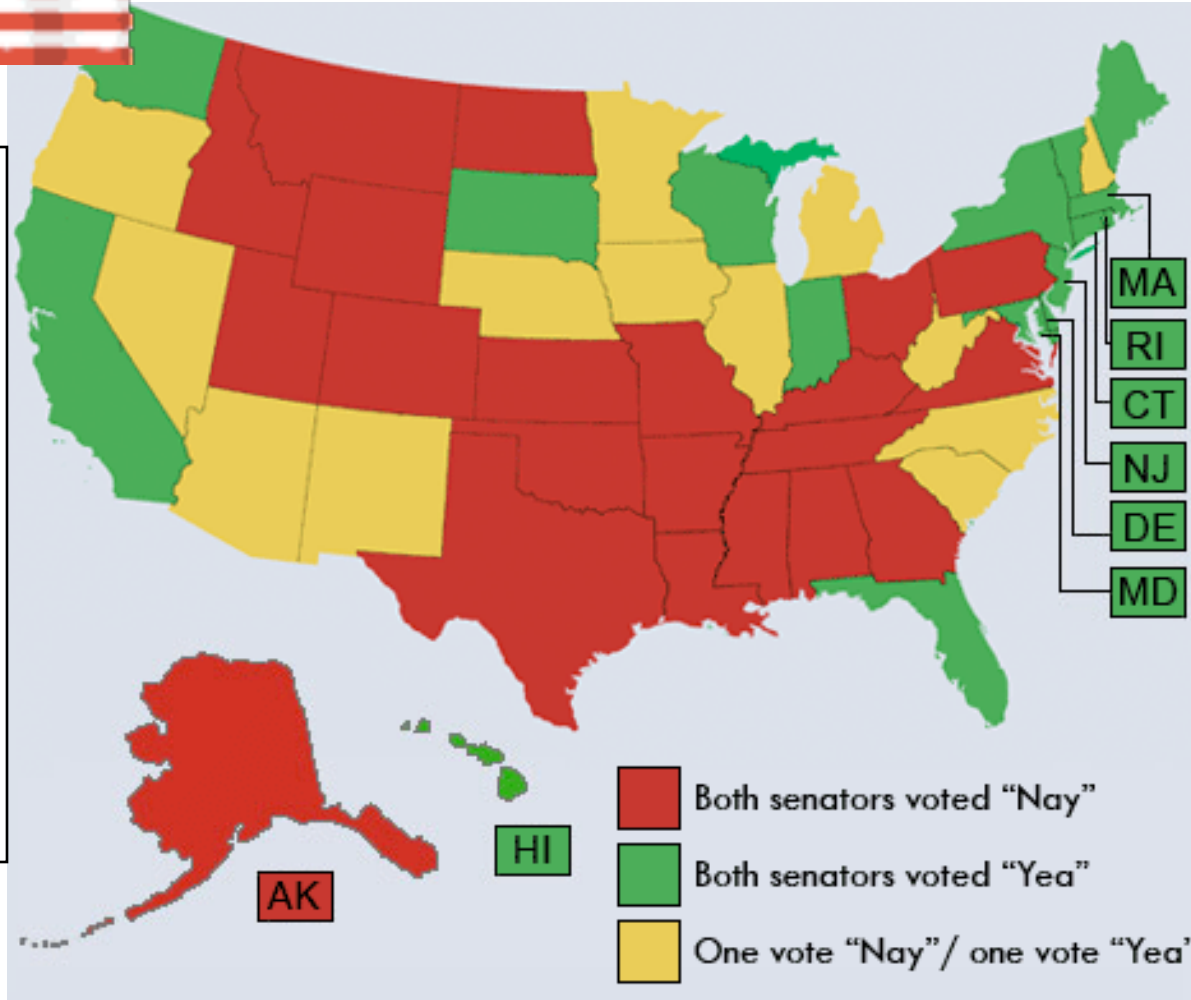
- Legal Borrowing / Transplants – widely observed
 - Borrowing (Watson), Bricolage (Levi-Strauss, Tushnet), Mimesis (Toynbee), Disease (Goethe), Diffusion (Hagerstrand), Interfusion (Sand), Transnational networks (Nye & Keohane; Slaughter), Learning ...
 - Similar concept in Biology (Arnold, Grant & Grant, Schluter): interspecies breeding yields hybrid offspring (typically unsuccessful, until environment changes); now seen as a major source of evolution
- Europe borrowing from the US
 - “Better Regulation”: Impact Assessment (IA), benefit-cost analysis (BCA)
 - Emissions trading (US: Pb, SO₂; now EU: GHGs)
 - Information instruments, e.g. environmental impact assessment (EIA) and toxics release registries (TRI)
- US borrowing from Europe
 - Precaution (Germany, Sweden)
 - Environmental Covenants (Netherlands)
 - Watershed management (France)
 - Proportionality Principle (and Proportionate Analysis) ?

The United States of America



Member states
1776: 13
1945: 48
2007: 50

“Official” languages
2007: 1 ?



2007 data

Population:
300m

GDP:
\$13.3
trillion

GDP/cap:
\$44,000

(Votes in US Senate on McCain-Lieberman Climate Stewardship Act, October 2003)

USA Institutions

USA (1776), US Constitution (1789, as amended)

Legislative Branch (Congress)

- Power to legislate (& regulate)
- Federal laws can “preempt” (supersede) member State laws
- Can override Pres. veto, by 2/3 vote
- Two main political parties (D, R)

1. Senate

- popularly elected, 6-year terms
- 100 members (2 per member State)

2. House of Representatives

- popularly elected, 2-year terms
- 354 members (per population)

Judicial Branch (courts)

- US Supreme Court
- Lower federal courts across USA

Executive Branch

- Implements laws; & Executive powers
- President and V.P.: elected nationally every 4 yrs (max. 2 terms)
- Power to propose new legislation to Congress; and to Veto acts of Congress
- President appoints cabinet’s senior officials (with Senate’s consent), & can remove most of them on his own
- Cabinet “Secretaries” head topical Departments (“Agencies”)
- Agencies delegated legislative power to issue rules (regulations), subject to oversight by President, Courts and Congress
- ~ 3 million Exec. Branch staff

Member States: 50, each with own Const’n & laws, 3 Branches

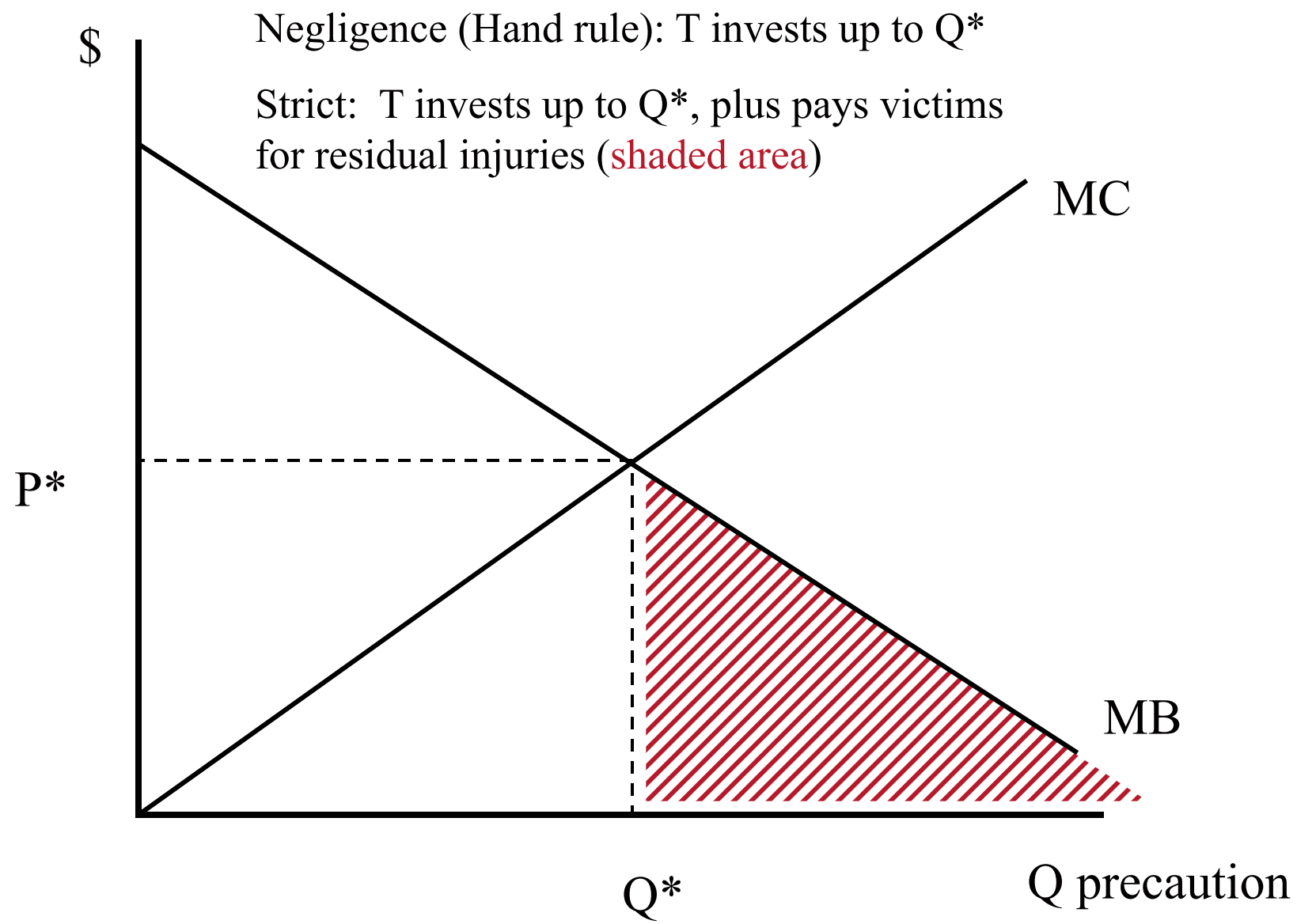
Impact Assessment (IA) and Benefit-Cost Analysis (BCA) in US Law: many applications

- Public projects
 - Dams (1940s) ... and now?
 - National Forest management ? NFMA sec. 6(k) ... diluted.
 - via Environmental Impact Assessment (NEPA, 1970): initially interpreted to require BCA, in *Calvert Cliffs Coordinating Committee v. Atomic Energy Commission* (D.C. Cir. 1971); but later the U.S. Supreme Court held NEPA is “purely procedural,” “stop and think.”
- Defense / military decisions
 - McNamara’s “Whiz Kids” at DOD (1960s)
 - Forgotten after Sept. 11, 2001 ? Stern & Wiener (2006)
- Tort Law (civil liability)
 - the “Hand Rule”: BCA for negligence liability (1947)
- Regulation
 - Judicial review of agency action: APA “arbitrary and capricious” clause (enacted 1946, interpreted since ~1970s); & key statutes.
 - Presidential oversight: Executive Orders (since the 1970s); Paperwork Reduction Act of 1980.

BCA in the USA: Tort Law

(civil liability, “responsabilité civile”)

- Negligence standard
 - Specific conduct, e.g. industry custom, proper medical practice
 - Balancing test largely replaces conduct test (except in medical malpractice)
 - Tortfeasor held negligent if “unreasonable”
 - Judge Learned Hand, *U.S. v. Carroll Towing* (2d Cir. 1947): a reasonable person invests in precautions that prevent more costly harms. Therefore, “unreasonable” if did not invest when $B < p(L)$, where B = burden of precautions, p = probability, and L = liability.
 - Legacy of the Hand Rule: “unreasonable” as a code word for failing to act when $MB > MC$.
 - Victim bears risk of residual injuries (non-negligent, where $MB < MC$)
- Strict liability (liability without fault)
 - Shifts risk of residual injuries (above $MB=MC$) from victims to tortfeasor
 - In short term, achieves identical result: tortfeasor invests up to $MB=MC$
 - In long term, = incentive to innovate ways to reduce MC , avoid liability
- Do juries punish BCA? Ford Pinto case; Viscusi study.



BCA in the USA: Congressional statutes

- Sometimes Congress **requires** BCA. E.g.:
 - CPSA (1972) (consumer products)
 - FIFRA (1975) (pesticides)
 - TSCA (1976) (toxics)
- Sometimes Congress **permits** BCA without requiring it, e.g.:
 - CWA (1977) (BCT for water pollution)
 - SDWA (1996 amdts.) (drinking water contaminants)
- Sometimes Congress **forbids** BCA. E.g.:
 - CAA sec. 109 (1970) (national ambient air quality standards)
 - OSHA sec. 6(b)(5) (1972) (workplace toxics)
 - ESA sec. 7 (1973) (endangered species)
 - RCRA sec. 3004m (1984) (hazardous waste treatment standards)
 - CERCLA sec. 121 (1986) (hazardous waste cleanup standards).
- Is there any coherent pattern to choices by Congress ??
- No BCA of Legislation itself
- Administrative cost reduction: Paperwork Reduction Act (1980)

BCA in the USA: Presidential orders

- Every President since Jimmy Carter has required economic impact assessment of major new regulations, by Executive Order (EO).
 - Carter EO 12044 (1978): economic impact analysis; RARG. Paperwork Reduction Act.
 - Reagan EO 12291 (1981): Regulatory Impact Analysis (RIA); Bs must “outweigh” Cs, $\max(B-C)$; OMB/OIRA authority to review & “return.”
 - Clinton EO 12866 (1993): maintained BCA; changed “outweigh” to “justify”; added qualitative & distributional effects; added Risk-Risk impacts; enhanced transparency.
 - Bush admin. (2001-): retained Clinton EO. Issued more “return” letters (“No”). Plus new “prompt letters”: using BCA to say “Yes” (e.g. trans-fat labels on food; defibrillators in the workplace). Circular A-4 (2003): more C-E analysis; lower discount rates (3% as well as 7%); probabilistic scenarios if > \$1b; BCA of homeland security regs. Ex post reviews. EO 13422 (Jan. 2007): covers “guidance,” requires agency decision by Pres. appointee.
- Why: reduce costs; maximize social net benefits; strengthen executive branch (after Great Society & Watergate): check the Congress, avoid review in the courts
- Agencies often quantify some Bs or Cs, but quantify & monetize both Bs and Cs only about 50% of the time (Hahn & Muething, 55 Admin. L. Rev. 608-42 (2003)).
- Is the USA now a “cost-benefit state” (Sunstein) ?

If BCA is required, How Quantitative ?

- A spectrum from Cool to Hot Analysis:
 - “Cool Analysis”: strict economic optimization, all impacts quantified & monetized.
 - “Hot analysis” (?) = “moral outrage,” especially after a crisis event.
 - Intermediate approach: “Warm analysis”: careful comparison of full portfolio of pros & cons, both quantitative and qualitative; cognitive process for good judgment; democratic device for transparency and accountability.
 - Benjamin Franklin (1772): “prudential algebra.”
 - J.M. Keynes: “better to be roughly right than precisely wrong.”
 - Cass Sunstein: “cognitive case” for BCA
 - BCA of BCA: VOI vs. COI: higher net benefits from including all important factors, than from quantifying & monetizing fewer factors?
 - EU approach: “Proportionate analysis”
- BCA as a “tool not a rule”
- Often difficult to tell which is intended by the law.
 - “Courts and Congress often use the phrase ‘cost-benefit analysis’ imprecisely, with the result that it is difficult to discern just what type of analysis is intended.”
Quivira Mining Co. v. NRC, 866 F.2d 1246, 1250 (10th Cir. 1989).

Executive Order 12291 (President Ronald Reagan, 1981)

Section 2. *General Requirements.* In promulgating new regulations ... all agencies ... shall adhere to the following requirements: ...

(b) Regulatory action shall not be undertaken unless the potential **benefits** to society for the regulation **outweigh** potential **costs** to society;

(c) Regulatory objectives shall be chosen to **maximize net benefits** to society;

(d) Among alternative approaches to any given regulatory objective, the alternative involving the **least net cost** to society shall be chosen; and

(e) Agencies shall set regulatory priorities with the aim of maximizing the aggregate net benefits to society ...

Section 3. *Regulatory Impact Analysis and Review.* ... (d) To permit each proposed major rule to be analyzed in light of the requirements of Section 2 ..., each preliminary and final **Regulatory Impact Analysis** shall contain the following information:

(1) A description of the potential benefits of the rule, including any beneficial effects that cannot be quantified in monetary terms, and the identification of those likely to receive the benefits;

(2) A description of the potential costs of the rule, including any adverse effects that cannot be quantified in monetary terms, and the identification of those likely to bear the costs;

(3) A determination of the potential net benefits of the rule, including an evaluation of effects that cannot be quantified in monetary terms;

(4) A description of alternative approaches that could substantially achieve the same regulatory goal at lower cost ... and a brief explanation of the legal reasons why such alternatives, if proposed, could not be adopted; and

(5) ... an explanation of any legal reasons why the rule cannot be based on the requirements set forth in Section 2 ...

Executive Order 12866 (President Bill Clinton, 1993)

Section 1. Statement of Regulatory Philosophy and Principles.

(a) *The Regulatory Philosophy.* Federal agencies should promulgate only such regulations as are required by law ... or are made necessary by compelling public need, such as material failures of private markets to protect or improve the health and safety of the public, the environment, or the well-being of the American people. In deciding how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. Costs and benefits shall be understood to include both quantifiable measures ... and qualitative measures ... Further, in choosing among alternative regulatory approaches, agencies should select those approaches that **maximize net benefits** (including potential economic, environmental, and other advantages; distributive impacts; and equity) ...

(b) *The Principles of Regulation.*

(1) Each agency shall identify the problem that it intends to address (including, where applicable, the failures of private markets or public institutions that warrant new agency action) as well as the significance of that problem.

(3) Each agency shall identify and assess available alternatives to direct regulation, including providing economic incentives ... such as user fees or marketable permits, or providing information upon which choices can be made by the public.

(5) ... an agency ... shall design its regulations in the **most cost-effective** manner to achieve the regulatory objective ...

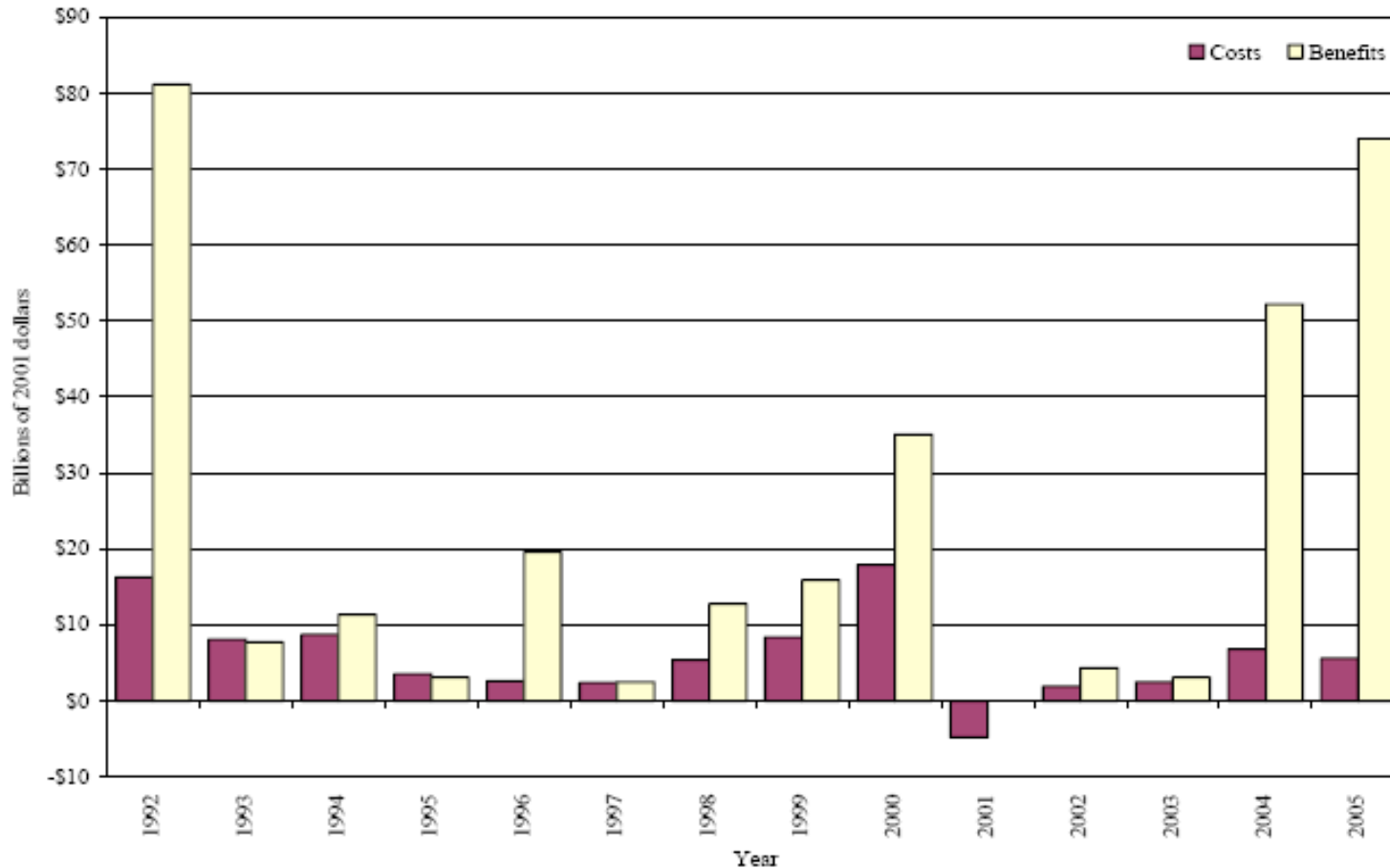
(6) Each agency shall assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the **benefits** of the intended regulation **justify its costs**.

(8) Each agency shall ... to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt.

(11) Each agency shall tailor its regulations to impose the **least burden** on society ... consistent with obtaining the regulatory objectives ...

Trend in ex ante BCAs in USA (aggregate):

Figure 2-2: Costs and Benefits of Major Rules (1992-2005)



(Source: U.S. OMB, 2006 Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities (Jan. 2007), p.32, at

http://www.whitehouse.gov/omb/infoereg/regpol-reports_congress.html .)

BCA can say 'yes' as well as 'no'

- Is ex ante BCA biased against regulation?
 - Costs overstated (industry exaggerates) ?
 - Benefits understated (difficult to quantify) ?
- BCA can promote regulation:
 - Lead (Pb) phasedown in gasoline (petrol), 1980s
 - CFC phaseout, 1987-95
 - Diesel emissions PM limits, 2000-05
- Question is institutional as well as (or more than) analytic: traditional posture of BCA is as a response to agency proposals (“return” letters, saying “no”)
- “Prompt letters”: institutional innovation at OMB (J.Graham)
 - To FDA: Label trans-fat content in foods, 2003
 - To OSHA: Put defibrillators in the workplace
 - To EPA: Study different types of PM air pollution
 - More? How best to make Prompt letters routine? Revesz & Livermore (2008): let petitions for rulemaking, if denied, be appealed to OMB based on BCA

Ex post evaluation of ex ante BCA

- How accurate are ex ante BCAs? Do they overstate costs and understate benefits?
- Need routine & systematic ex post evaluation, (1) to revise policies, and (2) to improve ex ante methodologies.
- Harrington, Morgenstern & Nelson, JPAM 2001: costs overstated, but benefits also overstated.
- OMB review of 47 cases (out of over 1000; and, not a representative sample):

Table 3-2: Tabulation of the 47 Case Studies

	Benefits	Costs	Benefits-Cost Ratio
Accurate	18 (38%)	12 (26%)	11 (23%)
Over	19 (40%)	16 (34%)	22 (47%)
Under	2 (4%)	12 (26%)	14 (30%)
Not Estimated	8 (17%)	7 (15%)	0 (0%)

(Source: U.S. OMB, Validating Regulatory Analysis: 2005 Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities (Dec. 2005), p.47, at <http://www.whitehouse.gov/omb/inforeg/regpol.html> .)

The European Union (so far ...)



Member states

1957: 6

1990: 12

2007: 27

Official languages

2007: 23

2007 data

Population:
493m

GDP:
\$13.4
trillion

GDP/cap:
\$28,000

EU Institutions (so far ...)

Treaties (1957 -) among Member States; Presidency rotates every 6 months

Council of Ministers (Brussels)

- representatives of the Member States (a legislature of 27 executives)
- usually those handling the topic = single-issue orientation

European Parliament

(Strasbourg/Brussels)

- popularly elected, 5-year terms
- 785 members (to be capped at 736)
- grouped in 7 parties, not by MS
- consultation / co-decision / assent
- can amend Commission's proposals

European Courts (Luxembourg)

- Court of Justice
- Court of First Instance
- Court of Auditors

European Commission (Brussels)

- President: appointed by MS & Eur. Parliament; can now (since 2002 Nice Treaty) ask a Commissioner to resign
- slate of [27] Commissioners, appointed for 5-year term by Pres. & slate OK'd by Eur. Parliament & Council
- Commissioners head topical Directorates General (DGs), Legal service, Sec't-Gen'l
- Commission has a monopoly on the power to propose new legislation
- "Directives" must be transposed into MS law; "Regulations" preempt MS law
- Commission implements EU laws
- ~ 25,000 "Eurocrats"

Agencies, other units

- Ombudsman, Eur Env't Agency, Eur Food Safety Agency, Eur Central Bank ...

BCA in European Union (EU) Law

- “Proportionality principle” = BCA
- “Precautionary Principle” (PP): Maastricht Treaty 130r (now Nice Treaty 174(2)) requires the “precautionary principle,” but undefined. European Commission “Communication” of Feb. 2000: PP requires BCA.
- Nice Treaty article 174(3) also requires assessing “the potential benefits and costs of action or lack of action” in environmental policy
- Member states’ laws: sometimes require BCA (including in adoption of PP).
- “Better Regulation” initiative (2002 -).

Nice Treaty – Title XIX – Environment

(Official Journal C 325 , 24/12/2002 P. 0033 - 0184

Official Journal C 340 , 10/11/1997 P. 0173 - Consolidated version)

Article 174

1. Community policy on the environment shall contribute to pursuit of the following objectives:
 - - preserving, protecting and improving the quality of the environment,
 - - protecting human health,
 - - prudent and rational utilisation of natural resources,
 - - promoting measures at international level to deal with regional or worldwide environmental problems.
2. Community policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Community. It shall be based on the **precautionary principle** and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.
 - In this context, harmonisation measures answering environmental protection requirements shall include, where appropriate, a safeguard clause allowing Member States to take provisional measures, for non-economic environmental reasons, subject to a Community inspection procedure.
3. In preparing its policy on the environment, the Community shall take account of:
 - - available scientific and technical data,
 - - environmental conditions in the various regions of the Community,
 - - the **potential benefits and costs of action or lack of action**,
 - - the economic and social development of the Community as a whole and the balanced development of its regions.
4. Within their respective spheres of competence, the Community and the Member States shall cooperate with third countries and with the competent international organisations. The arrangements for Community cooperation may be the subject of agreements between the Community and the third parties concerned, which shall be negotiated and concluded in accordance with Article 300.
 - The previous subparagraph shall be without prejudice to Member States' competence to negotiate in international bodies and to conclude international agreements.

Proportionality Principle

- General principle of European Union law
- *Pfizer Animal Health S.A. v. Council, Case T-13/99, 2002 WL 31337 (European Court of First Instance, Sept. 11, 2002)*, ¶¶ 410-411: "The Court considers that a **cost/benefit analysis is a particular expression of the principle of proportionality** in cases involving risk management. . . . the principle of proportionality, which is one of the general principles of Community law, requires that measures adopted by Community institutions should not exceed the limits of what is appropriate and necessary in order to attain the legitimate objectives pursued by the legislation in question, and where there is a choice between several appropriate measures, recourse must be had to the **least onerous**, and the disadvantages caused must not be disproportionate to the aims pursued . . ."
- **But: *id.* ¶ 456:** "The protection of public **health**, which the contested regulation is intended to guarantee, must **take precedence over economic considerations.**"
- "the relation between precautionary and proportionality principles is obviously one of the most important disputed subjects in the [Commission's] Communication on the precautionary principle" – Hannes Veinla, 8 *Juridica Int'l* 186, 196 (2003)

Precautionary Principle

- The rise of the “Precautionary Principle” (PP):

1970: German *Vorsorgeprinzip*

1976: US Clean Air Act, decision in *Ethyl Corp v. US* (DC Cir.)

1978: US Endangered Species Act, decision in *TVA v. Hill* (S.Ct.)

1992: Rio Declaration para. 15

1992: Maastricht Treaty art. 130r (now Nice Treaty art. 174)

2000: European Commission “Communication on the PP”

2005: Charte de l’Environnement de la France

- Is the PP opposed to BCA ?
 - “Uncertainty is no excuse for inaction”
 - “Shift the burden of proof, so that the proponent of a product or activity has the burden to show it is safe before it can go forward”

Reclaiming the PP as Decision Analysis, BCA

- European Commission, “Communication on the Precautionary Principle” (February 2000): measures based on the PP should be:
 - *proportional* to the chosen level of protection,
 - *non-discriminatory* in their application,
 - *consistent* with similar measures already taken,
 - *based on an examination of the potential benefits and costs* of action or lack of action (including, where appropriate and feasible, an *economic cost/benefit analysis*),
 - *subject to review*, in the light of new scientific data, and
 - *capable of assigning responsibility for producing the scientific evidence* necessary for a more comprehensive risk assessment.
- In effect, reclaims the PP as part of decision analysis.
- Similar to US Executive Order 12866 (Clinton, 1993; still in force)
- Shift in EU policy from PP to Impact Assessment (Wiener, Lofstedt)

Even member states' versions of the PP point to BCA

Charte de l'Environnement de la France, février 2005:

« Lorsque la réalisation d'un dommage, bien qu'incertaine en l'état des connaissances scientifiques, pourrait affecter de manière grave et irréversible l'environnement, les autorités publiques veilleront, par application du **principe de précaution**, et dans leurs domaines d'attribution, à la mise en œuvre de procédures d'évaluation des risques et à l'adoption de mesures **provisoires et proportionnées** afin de parer à la réalisation du dommage » (article 5)

EU “Better Regulation” Initiative

- EU White Paper on Governance, Mandelkern Group Report (2001)
- Impact Assessment (IA) of proposed legislation
 - IA Guidelines (2002) (Prodi Comm’n). After Santer: ‘Good governance.’
 - Revised IA Guidelines (2005, 2006) (Barroso Commission) require BCA (“positive and negative impacts” of each option, incl. no action; direct & indirect impacts). Lisbon Agenda: ‘competitiveness.’
 - Analysis “proportionate” to significance of impacts.
 - Of the 70 Extended IAs in 2003-05, fewer than 40% quantify and monetize either Bs and Cs; only 17% compared net benefits (Renda 2006, p.63).
- Administrative Cost reduction. Simplification (repealing, revising old laws).
- Subsidiarity. Consultation.
- Issues:
 - Too much focus on Administrative Costs and Simplification ?
 - Any central oversight mechanism such as OMB/OIRA ?
 - Quality of IAs uneven
 - Attention to risk-risk tradeoffs? Ad hoc ex’s: BSE in blood; counterterrorism.
 - Member State programs vary
 - What influence on key decisions? e.g. REACH

See http://ec.europa.eu/enterprise/regulation/better_regulation/index_en.htm , http://ec.europa.eu/governance/impact/index_en.htm .

Variation in Better Regulation measures across the EU member states.

(Source: European Commission, “Communication on Better Regulation for Growth and Jobs in the EU,” COM(2005)97, 16/03/2005, p.17.)

	Better regulation programme	Specific RIA policy	Obligatory RIA	Alternative instruments considered	Guidelines on RIA	Coordinating body for RIA	Consultation part of RIA	Formal consultation procedures	Direct stakeholder consultation	Tests of impact on small enterprises	Exemptions for SMEs	Total Y+(Y)
Belgium	(Y)	N.A.	(Y)	N.A.	(Y)	(Y)	N	(Y)	(Y)	(Y)	N	7
Czech Republic	Y	N.A.	N	Y	N.A.	N.A.	N.A.	N.A.	N.A.	(Y)	N	3
Denmark	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N	10
Germany	Y	N.A.	N.A.	N.A.	Y	Y	Y	Y	N.A.	N.A.	N.A.	5
Estonia	N	N	Y	Y	Y	N.A.	N.A.	N	N	N.A.	Y	4
Greece	(Y)	(Y)	N	N	N	N	Y	N	N	N	N.A.	3
Spain	Y	(Y)	Y	Y	(Y)	(Y)	N	N	N	N	N.A.	6
France	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	0
Ireland	Y	N	N	(Y)	(Y)	N	(Y)	(Y)	N	N	N	5
Italy	(Y)	Y	N	(Y)	Y	(Y)	(Y)	N	Y	(Y)	N	8
Cyprus	N	N	N	N	N	N	N	N	N	N	N.A.	0
Latvia	Y	Y	Y	Y	Y	Y	Y	Y	N	Y	N	9
Lithuania	N.A.	Y	Y	Y	Y	N.A.	N.A.	N.A.	N	N.A.	N.A.	4
Luxembourg	Y	N.A.	Y	Y	N.A.	Y	Y	Y	N	N	Y	7
Hungary	Y	(Y)	Y	N	N	Y	(Y)	(Y)	N	N	N	6
Malta	Y	N.A.	N.A.	N	N.A.	(Y)	N	N	Y	N	Y	4
Netherlands	Y	Y	N.A.	Y	Y	Y	N	N	Y	(Y)	Y	8
Austria	Y	Y	Y	Y	Y	N	Y	Y	Y	N.A.	N	8
Poland	Y	Y	Y	Y	Y	Y	Y	Y	(Y)	N	Y	10
Portugal	N	N	N	N	N	N	N	N	N	N	N	0
Slovenia	Y	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	1
Slovakia	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	(Y)	N.A.	N	1
Finland	Y	Y	Y	Y	Y	(Y)	Y	Y	Y	N.A.	N.A.	9
Sweden	Y	Y	Y	Y	Y	Y	Y	Y	Y	N	N	9
United Kingdom	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N	10
Total Y+(Y)	19	13	12	15	15	14	12	12	11	7	5	

Legend

Y	Measures exist	(Y)	Measures planned/ Available partially	N	No measures exist	N.A.	Information not available
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Cutting “Administrative Costs”

- US (www.whitehouse.gov/omb/inforeg/infocoll.html)
 - Paperwork Reduction Act of 1980, renewed 1995
 - Small Business Paperwork Relief Act of 2002
 - OMB/OIRA has gone beyond administrative costs to assess full costs and benefits (BCA).
- EU: major initiative to “Cut Red Tape.” (www.administrative-burdens.com)
 - Use of Standard Cost Model (SCM) to calculate information collection burdens.
 - EU goal: cut by 25% by 2012, at EU level and in Member States
 - Simplification: via “loi anti-loi” (France), “Kafka test” (Denmark), etc.
- Salutory aspects:
 - Good to measure and reduce *unneeded* burdens on businesses, individuals
 - Good to review existing regulations as well as new regulations
- But, should not focus *solely* on cutting Administrative Costs.
 - could cut the *benefits* of information collection programs, such pollutant discharge registries (e.g. TRI), or BCA itself
 - alternative could be even more costly regulations (or lack of needed protections)
- Instead, Administrative Costs should be managed as one element of Impact Assessment of full (integrated) costs and benefits, to maximize net benefits.
 - EU revised IA Guidelines (March 2006) recognize this – see p.39, Box 11

Effective oversight of regulation in the EU ?

- Judicial review?
 - Standing to sue more difficult to obtain than in US
 - EU Courts more deferential to regulators than in US. E.g., *Pfizer, Alpharma* (ECFI 2001): precautionary bans of animal antibiotics upheld
 - Despite regulators' failure to consult science advisory board in one case, and decision contrary to science advisory board's recommendation not to regulate in the other case. Contrast the US *Benzene* and *Chloroform* cases.
 - Varying views in European courts (Marchant & Mossman 2004)
 - Courts may start to act. Recent example: *Spain v. Council* (ECJ 2006): cotton subsidy policy rejected for failure to conduct a thorough Impact Assessment.
 - Role for Court of Auditors? Or for European Ombudsman?
- Executive review?
 - Secretariat-General could act, but lacks staff, resolve?
 - Commission is collegial; President is not clearly superior to other Comm'rs
 - Commission has monopoly on initiating legislation, so other institutions may want to check the Commission (... Eur. Parliament? Council? Member states?)
 - Council of Ministers could check Comm'n, but convenes single-issue ministers

The EU's new Impact Assessment Board (IAB)

- IAB, launched November 2006:
 - “group of high-level officials selected on the basis of their expert knowledge and experience” [Deputy Secretary General & 4 Directors of DGs Enterprise, Environment, Employment, Economics & Finance]. 2-year terms.
 - “under the direct authority of the President of the European Commission and independently of departmental influence” – but nominated by the DGs
 - Initial focus on “quality control of draft final IAs”; will gradually address earlier stages in the IA process
 - Can issue prompt letters on “additional initiatives that could be subject to IA.”
 - Review is to be “qualitative” and “proportionate”
- Questions:
 - Will it have adequate staff, with expertise? Funding?
 - Can seek “internal” and “external” expertise. In the Mmbr States? the US?
 - Is its timeline too tight (1 month to review draft IA, 1 meeting to decide) ?
 - Will it have the power to influence decisions? Can issue “opinions on IAs,” “prompt letters” [to do an IA], and “notes,” but effect on decisions is unclear.
 - Will IAB members be too loyal to their DGs?
 - Will a 5-member board have trouble making decisions?
 - Transparency, access?

Lessons on IA and BCA from USA and Europe:

A. Methods

1. Use “warm analysis”: emphasize full portfolio effects, not narrow quantification
 - Use Risk-Risk Analysis as well as (or as part of) BCA – to evaluate the full portfolio effects of policies in a multi-risk world
 - US: EO 12866 requires R-R analysis. Circular A-4 discusses R-R, but omits from scorecard table. Agencies often focus on target risk & compliance cost. EU: ad hoc.
2. Don’t focus narrowly on “administrative costs” (information/paperwork)
3. Pursue “proportionate (degree of) analysis” (VOI / COI)
 - US: \$ level thresholds for added analysis; no express use of “proportionate” analysis
 - EU: “Proportionate” (but to size of impact; should be to *change* in impact via analysis)
4. Assess international as well as domestic impacts.
 - US: Circular A-4 says “focus on impacts to citizens and residents of the US; assess impacts beyond the borders of the US separately”
5. Apply IA & BCA more widely: not only for risk regulation, but also for trade measures, international treaties, subsidies, water projects, forest management, national security & counterterrorism measures, ...
 - US: adding treaties, “guidance”; still may omit other policy areas.
 - EU: covers all policies in Commission Work Plan
6. Study transatlantic differences in methods
 - VSL: US ~ \$6m, EU ~ \$1.3m.
 - Discount rate: US 7 % and 3 %. EU 4%.
 - Uncertainty analysis: scenarios, sensitivity. US Circular A-4: formal prob. analysis if >\$1b.

Lessons on IA and BCA from USA and Europe:

B. Institutions

1. Apply IA & BCA to Legislation as well as rulemaking
 - US applies only to rulemaking; EU applies to all legislation
2. Apply “Proportionality Principle” to all lawmaking
 - US applies selectively; EU applies generally. Authorize IA notwithstanding statutory bars.
3. Use BCA to “prompt” the good as well as to reject the bad
 - US: OIRA innovation of “prompt” letters; make them more routine ...
 - EU: IAB can prompt conduct of an IA, but not (yet) policy proposals
 - Special attention to extreme risks – low-probability high-consequence mega-catastrophes.
4. Establish an expert central oversight body
 - US: OIRA (with executive authority, expert career staff)
 - EU: IAB (but needs greater authority/influence, expertise, time, ...)
 - Collaborate with Member States’ expert groups.
 - Collaborate with US OIRA, e.g. parallel RIAs, comparisons, simulations, exchanges.
 - Cross-agency consultation – to identify and resolve cross-domain risk tradeoffs.
 - Interpose review where it will serve as a check & balance – which will differ in different constitutional structures. In EU: at the EU Parliament? In US: at the Congress?
5. Learning: over time, across agencies, across countries.
 - Ex post evaluations of ex ante assessments: to revise policies, and to improve ex ante RIA methods. Build in real-time data collection & evaluation.
 - Cultivate the civil society of reasoned analysis: BCA via NGOs, think tanks.
 - *Does IA matter? Empirical studies of regulatory oversight.*
6. Toward a transatlantic policy laboratory

Thank You